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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

CITY OF LONG BEACH, LONG BEACH CITY COUNCIL, EVAN BRAUDE, WALLACE EDGERTON, JAN HALL, THOMAS J. CLARK, ERNIE KELL, RAY GRABINSKI, ED TUTTLE, AND WARREN HARWOOD,

Petitioners,

VS.

AIRCAL INC., AMERICA WEST AIRLINES, WESTERN AIRLINES, TRANSWORLD AIRLINES, INC.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals, Ninth Circuit, Nos. 86-6661 and 86-6662 (C.D. Cal. No. CV 83-4065 LEW)

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether a district court has discretion to determine the minimum number of jet flights to be permitted at a municipal airport neither owned nor operated by the federal government?

PARTIES BELOW

The parties to the proceedings in the U.S. Court of Appeals for the Ninth Circuit from which review is sought are Petitioners the CITY OF LONG BEACH, the LONG BEACH CITY COUNCIL, EVAN BRAUDE, WALLACE EDGERTON, JAN HALL, THOMAS J. CLARK, ERNIE KELL, RAY GRABINSKI, ED TUTTLE, and WARREN HARWOOD,* and Respondents AIRCAL INC., AMERICA WEST AIRLINES, WESTERN AIRLINES, and TRANSWORLD AIRLINES, INC.

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*Petitioners state that they have no parent companies, subsidiaries, or affiliates to list pursuant to Supreme Court Rule 28.1.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, the City of Long Beach, the Long Beach City Council, and its individual members (collectively the "City"), pray that a writ of certiorari issue to the United States Court of Appeals for the Ninth Circuit to review that Court's decision affirming an unprecedented mandatory injunction of the Federal District Court for the Central District of California which, *inter alia*, compels the proprietor of the Long Beach Municipal Airport

(the "Airport") to allow a 44 percent increase in the number of air carrier jet takeoffs and landings.[1]

The injunction trammels legitimate local environmental goals by compelling increases in flights by the most environmentally disruptive class of aircraft when community noise from airport operations already exceeds criteria for maximum exposure which none of the respondents challenge.[2] Although premised on the federal interest in a "vibrant national transportation system" (Appendix B, p. B-2), the Order makes no finding, express or implied, that Congress has preempted the power of airport proprietors to limit community noise from aircraft operations or that the burden on commerce imposed by the City's environmental regulation "is clearly excessive in relation to the putative local benefits" of the ordinance. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 847, 25 L.Ed.2d 174 (1970). Nor is there any finding of discrimination against interstate commerce.

Review by this Court is appropriate because this case implicates the problems of airport capacity which have been the subject of ongoing Congressional scrutiny, FAA notices of proposed rulemaking, industry attention, and public concern[3] and the injunction in issue posits a solu-

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[1]The injunction also results in an 80 percent increase in the number of air carriers using the Airport and a 40 percent increase in the number of passengers; all notwithstanding evidence that the passenger terminal and related facilities are already overtaxed during peak periods.

[2]Noise from existing aircraft operations has already precipitated in excess of 1,280 nuisance and inverse condemnation suits against the City — suits which the respondents and the United States assert are the sole responsibility of the City.

[3]Since January 1, 1986, more than 200 articles have treated the problem of noise and capacity at airports around the nation. A January 31, 1986 article in The Washington Post discusses a recent

tion to this national problem which flatly contradicts the principles of federalism enunciated by this Court in its dormant Commerce Clause cases.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is unreported. It is set forth in Appendix A at page A-1. The District Court's Order compelling new flights is also unreported. It is set forth in Appendix B at page B-1.

In relevant part, the District Court concluded "that the record raises serious questions as to the reasonableness and fairness of the City's program to limit growth at Long Beach Airport." (Appendix B, p. B-3.) The Court thus ordered the City to increase the permissible number of air carrier flights notwithstanding undisputed evidence that noise from present operations already exceeds the City's unchallenged noise goal. The Ninth Circuit presumed that the District Court had discretion to dictate "the appropriate minimum number of flights to be permitted" at the Airport and refused to find a clear abuse of such discretion. (Appendix A, p. A-3.)

JURISDICTION

The District Court's jurisdiction was invoked on the basis of 28 U.S.C. Section 1331 (federal question jurisdiction). The Ninth Circuit's jurisdiction over the appeal of

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proposed policy statement from the FAA on the subject. A New York Times story, on November 16, 1986, discussed the issues of federalism which are implicated. In the month of April, 1987 alone, at least 8 articles have appeared which discuss the problem of airport capacity: New York Times, April 12, 19, 26; Aviation Week and Space Technology, April 20; Congressional Quarterly, April 18; Washington Post, April 5; Los Angeles Times, April 2; Bureau of National Affairs, Daily Report for Executives, April 24, 1987.

the District Court's Order was premised upon 28 U.S.C. Section 1292(a) (appeal of an order granting and refusing to vacate a preliminary injunction). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

Review by certiorari is sought on the grounds that the Ninth Circuit has decided a substantial question arising under the United States Constitution and federal statutes involving aviation contrary to the decisions of this Court upholding the power of local municipalities to adopt environmental and land use regulations which do not impose burdens on interstate commerce which are clearly excessive when considered in view of the local benefits.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States Article I, Section 8, Clause 3:

> "The Congress shall have the power to regulate Commerce with foreign nations, and among the several States, and with the Indian Tribes;"

Constitution of the United States Article VI, Paragraph 2:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, and any Thing in the Constitution or Laws of any State to the contrary notwithstanding."

STATEMENT OF THE CASE

In 1981, in an effort to deal with the problems of noise associated with increasing numbers of operations at the Airport by air carrier jets, the City Council adopted an

ordinance which established, *inter alia*, a limit of 15 air carrier jet flights per day and gave a priority to less noisy planes. (E.R. 1152-63.)[4] In 1983, the Airport was being served by three air carriers. (E.R. 121, Paragraph 6; 1155.) When the City received requests to operate more than 15 flights, the City, pursuant to the 1981 ordinance, allocated the 15 allowable flights among five carriers. Two of the incumbent carriers were informed that they would have to reduce their operations.

On June 23, 1983, Alaska Airlines ("Alaska"), one of the airlines which was to lose a flight, brought suit to enjoin the City from reducing its utilization of the Airport. Alaska claimed that the 1981 ordinance violated the Commerce, Due Process, Equal Protection, and Supremacy Clauses of the United States Constitution, and was in conflict with agreements between the City and the Federal Aviation Administration ("FAA"). (E.R. 1143.) Since Alaska filed its original complaint, numerous other commercial air carriers have joined the suit as plaintiffs-in-intervention, making substantially similar claims for relief. Some of the carriers have added causes of action for violations of the Federal Aviation and Civil Rights Acts. The plaintiffs seek declaratory and injunctive relief, as well as attorneys' fees and monetary damages.

In December 1983, after new flights had been awarded by the City to the carriers which had qualified under the City's then-operative ordinance, District Judge Laughlin Waters enjoined the City from reducing any of the flights previously allocated (or expected to be allocated) to the carriers already using the Airport. This resulted in a minimum of 18 daily flights (each flight being one takeoff

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[4]References are to the Excerpts of Record filed by the Petitioners in the Ninth Circuit.

and one landing) at a time when the City was seeking to reduce the impacts of aircraft noise. (E.R. 12.) Following entry of that order, the litigation was held in abeyance while the City conducted an extensive study under Part 150 of the Federal Aviation Regulations, 14 CFR Section 150 *et seq.* A City-appointed task force (the "Task Force"), composed of representatives of all groups interested in the Airport (including the airlines), was charged with gathering information and submitting recommendations to the City Council on methods to achieve compatibility between the Airport and its surrounding community. (E.R. 516; 970.)[5]

On July 22, 1986, following receipt of a host of recommendations from the Part 150 Task Force concerning methods to reduce the impacts of aircraft noise while permitting additional service by air carriers, the City Council adopted a comprehensive Noise Compatibility Program and an ordinance to implement it. (E.R. 281-303; 305 *et seq.*) The central elements of the ordinance are the determinations (1) that no homes, schools, or hospitals should be exposed to annual noise greater than 65 decibels on the Community Noise Equivalent Level

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[5]In May of 1986, the City began to receive formal claims from residents of the community surrounding the Airport that noise and other pollution from aircraft operations constituted a taking of their property without just compensation. Damages under California's novel "continuing nuisance" law were also sought. See *Baker v. Burbank-Glendale-Pasadena Airport Authority*, 39 Cal.3d 862, 872, 218 Cal.Rptr. 293, 705 P.2d 866 (1985), *cert. denied*, ____ U.S. ____, 106 S.Ct. 1200, 89 L.Ed.2d 314 (1986) and *Greater Westchester Homeowners Ass'n v. City of Los Angeles*, 26 Cal.3d 86, 97, 160 Cal.Rptr. 733, 603 P.2d 1329 (1970), *cert. denied*, 449 U.S. 820, 101 S.Ct. 77, 66 L.Ed.2d 22 (1980). Damages in excess of $300 million have now been demanded on behalf of more than 1,280 local residents. (E.R. 144.)

("CNEL") scale[6] and (2) that the parts of the community which have so far avoided the adverse impacts of jet noise should be protected from increases in the noise they presently receive (primarily from the considerable number of general aviation flights). (E.R. 286; 273, Paragraph 3; 277-8, Paragraphs 9-10.)[7]

In order to achieve the goal of having no incompatible property exposed to more than 65 CNEL, cumulative noise in the residential areas to the northwest and southeast of the Airport must be reduced (homes in these areas presently receive noise above 65 CNEL). (E.R. 274, Paragraph 4.) To reach the established noise limitation without necessarily reducing aviation activity at the Airport, the ordinance, *inter alia*, established maximum "Single Event Noise Exposure Levels" ("SENEL's") (limitations on the amount of noise that can be made by aircraft during each takeoff and landing) and a collection of restrictions on general aviation, charter, and industrial

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[6]CNEL is a weighted average of noise occurring during a 24-hour day. The methodology takes into consideration the peak noise levels produced by individual aircraft, the number of flights, the amount of time during which aircraft noise is intrusive, and the time of day or night during which the intrusions occur. The State of California and other regulatory agencies (including the federal government) have established 65 decibels of noise on the CNEL scale as the maximum level of cumulative noise generally regarded as reasonable in the residential community around an airport. (E.R. 330, Paragraph 7.)

[7]In adopting the ordinance, the City Council chose not to adopt one possible methodology which would have allowed more air carrier flights — the shifting of business jet operations to an alternate runway so that they would fly over a part of the community which is not presently exposed to jet noise. The reductions in noise in the part of the community which had received business jet noise could then have been the predicate for an increase in air carrier flights over that area without an overall increase in the level of cumulative noise received by that segment of the City.

operations.[8] Contrary to the desire of the air carriers, the ordinance required that cumulative noise be reduced to the 65 CNEL goal before new air carrier flights would be permitted.

Following adoption of its new program, several air carriers moved to modify the 1983 injunction to require the City to permit an immediate increase in flights. (E.R. 82, 89, 96, 103, 110.) On September 8, 1986, the District Court heard arguments on the motions. On October 17, 1986, the Court ordered the City to permit an increase in air carrier flights to 26 daily departures and 26 daily arrivals. (Appendix B.) On November 7, 1986, the City timely filed a Notice of Appeal (E.R. 1) and a motion for a stay of the preliminary injunction (E.R. 1199-1206). On December 1, 1986, the District Court denied the City's motion to stay, after which a motion was made to the Circuit Court for a stay pending appeal. (E.R. 1193-94.) On January 14, 1987, the Circuit granted a stay of the District Court's Order pending appeal.

On April 14, 1987, the Circuit filed its Memorandum affirming the District Court. (Appendix A.) It also entered an Order dissolving the stay pending appeal. On April 27, 1987, the Court denied the City's motion for a further stay pending review by certiorari. On April 29, 1987, the petitioners sought a stay of the District Court injunction pending the timely filing and action on a petition for certiorari. Justice O'Connor denied that Motion on May 4, 1987.

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[8]The studies conducted by the Task Force (summarized at E.R. 332-37) demonstrated that if the SENEL limits and other noise mitigation measures were implemented, cumulative noise levels would be sufficiently reduced so that air carrier flights could be increased without resulting in community noise exceeding the 65 CNEL limit. (E.R. 275, Paragraph 6.)

REASONS FOR GRANTING THE WRIT

At issue here is the tension between the federal interest in interstate commerce and the local interest in maintaining a chosen level of environmental quality. The last time such an issue was presented in the aviation area was in *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 638, 93 S.Ct. 1854, 36 L.Ed.2d 547 (1973). There, the Supreme Court decided, by a five to four decision authored by Justice Douglas, that a city which did not own an airport within its jurisdiction was preempted from regulating noise from aircraft using it. The Court acknowledged that the power of municipal proprietors to adopt aircraft noise regulations was not preempted, but left for another day the issue of the scope of that power. Justice Rehnquist wrote for a four-Justice minority which accepted the position of the United States and found no basis for concluding that Congress intended to oust any municipality (proprietor or not) within which an airport was located from exercising its traditional powers to preserve environmental quality. 411 U.S. at 640-54.

In the years which have followed the *Burbank* decision, the Circuit Courts have occasionally addressed the question of the scope of proprietor power and the standards under which the federal courts will review its exercise. In no case has there been a determination that the federal courts may affirmatively compel a municipal proprietor to raise a reasonably established ceiling on maximum permissible noise in order to accommodate the interests of interstate commerce.

While the Circuits have grappled with the extent of proprietor power in light of the federal preemption of airspace management, the Supreme Court has recently tightened the burden of demonstrating that a local regulation in an area Congress has refused to preempt entirely is invalid under the Supremacy or Commerce Clause. The

tenor of the current decisions of the Court reflect a renewed sensitivity to the propriety of locally elected officials taking steps to protect local environmental concerns notwithstanding the fact that federal interests may be affected. As recently as March 24, 1987, the Supreme Court upheld the power of the California Coastal Commission to regulate mining in a national forest despite a claim that several federal acts regarding the use of federal land preempted the state's power. *California Coastal Commission v. Granite Rock Company*, ___ U.S. ___, 107 S.Ct. 1419, 94 L.Ed.2d 577 (1987). *See also Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 104 S.Ct. 105, 78 L.Ed. 443 (1984); *CTS Corp. v. Dynamics Corporation of America*, ___ U.S. ___, 107 S.Ct. 1637 (1987); *Wardair Canada, Inc. v. Florida Department of Revenue*, ___ U.S. ___, 106 S.Ct. 2369, 91 L.Ed.2d 1 (1986).

Notwithstanding the narrowness of the grounds on which an order such as that in issue might properly be based, the District Court's conclusion to increase the environmental burdens of the Airport is supported only by a vague conclusion that additional flights are "justified". (Appendix B, p. B-3.) Whatever may be the underlying rationale, however, the Order, and the Circuit's affirmance, necessarily runs counter to deeply ingrained principles of federalism. First, the order is manifestly inconsistent, as a matter of law, with decisions of the Circuits and of this Court regarding matters of local concern into which Congress has refused to intervene.[9]

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[9]In the words of the Federal Aviation Administration (the "FAA"), the City retains the power to limit the environmental impacts of aircraft operations "in response to the locally determined desire for quiet and the locally determined need for the benefits of air commerce". (34 Fed.Reg. 18355 November 18, 1969.) The conclusion that there is no preemption of proprietor power to adopt nondiscriminatory noise regulations has been confirmed by the Second Circuit (*see British Airways Board v. Port Authority of New York*, 558

Second, even if it is assumed that the District Court did not adopt the wrong legal principles, it at least erred in applying them to the virtually undisputed facts: There simply was no evidence upon which it might have been concluded that the City's refusal to permit increases in the number of jet operations until its unchallenged noise goals have been achieved *unduly* burdened interstate commerce. Under the teachings of *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 847, 25 L.Ed.2d 174 (1970) and *Brotherhood of Locomotive Firemen and Engineermen v. Chicago, Rock Island & Pacific Railroad*, 393 U.S. 129, 89 S.Ct. 323, 21 L.Ed.2d 289 (1968)), the District Court was obliged to find that the burdens of the ordinance on interstate commerce were "clearly excessive" in light of the local benefits. It did not, as it could not.

Finally, even assuming that the District Court could have ordered new entry into the Airport because of some compulsion of federal law, the Court at least erred in failing to draw an injunction which would accomplish this objective without compromising the legitimate environmental concerns of the City. Rather than compelling increases in flights, with the environmental burdens which attend them, the Court should have ordered the City to develop a mechanism to permit entry without increasing flights (for example, by re-allocating the existing flight capacity of the Airport).

This approach would have served the federal interest: (1) without depriving the City, its residents, and their elected officials of their constitutional right to be free

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F.2d 75, 84-85 (2d Cir. 1977)), by the Ninth Circuit (*see Santa Monica Airport Ass'n v. City of Santa Monica*, 481 F.Supp. 927 (C.D.Cal. 1979), *aff'd* 659 F.2d 100, 104-05 (9th Cir. 1981)), and by this Court (*see City of Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. 624, 635, n. 14, 93 S.Ct. 1854, 36 L.Ed.2d 547 (1973)).

from unnecessary federal interference in matters of peculiar and wholly legitimate local concern; (2) without subjecting thousands of residents of the City to increases in cumulative noise and the number of intrusions by the sorts of aircraft which are most disruptive to home and school activity; and (3) without exposing the City — which has already been named as a defendant in more than 1,280 inverse condemnation suits as a result of present noise levels — to new vistas of financial exposure.

In sum, the City's petition for certiorari is amply supported by the trend away from federal intrusions into matters of appropriate local cognizance; by the broad significance of the issues of airport noise, access, and capacity which this case raises; by the departure from the teachings of this Court which the decisions below represent; and by the impact that comparable decisions could have on the legitimate rights of municipalities to act for themselves in unpreempted areas of environmental quality.

THE NINTH CIRCUIT'S ASSUMPTION THAT THE DISTRICT COURT HAD DISCRETION TO DETERMINE THE MINIMUM NUMBER OF FLIGHTS AT A MUNICIPAL AIRPORT IS UNPRECEDENTED AND UNSUPPORTABLE

A. The City Has Clear Authority to Enact Noise Ordinances, and Such Ordinances Are Entitled to Substantial Deference.

Proprietor power over noise has been explicitly recognized by Congress, by the Department of Transportation, and by the FAA. In 1968, in connection with the amendments to the Federal Aviation Act giving the FAA authority to promulgate source noise limits, the Senate Commerce Committee stated that it did not intend "to effect any change in the existing apportionment of powers

between the Federal and State and local governments." Sen.Rep.No. 1353, 90th Cong. 2d Sess. (1968) (reprinted in (1968) *U.S. Code Cong. & Ad. News* 2963). The Committee then quoted with approval a June 22, 1968 letter, prepared by the Secretary of Transportation, which confirmed that the federal government did not intend to establish a federal system which would require airports to accept additional noise burdens and, for that purpose, to purchase additional noise easements. *Id.; see Burbank,* 411 U.S. at 635 n. 14.

Pursuant to the authority given it in 1968, the FAA adopted Part 36 of the Federal Aviation Regulations. 14 CFR Part 36, 34 Fed.Reg. 18355 *et seq.* (November 18, 1969). Part 36 established standards for the design and manufacture of aircraft and aircraft engines. In the Preamble to Part 36, the FAA clearly stated that federal regulation of engine noise did not undercut the role and responsibility of airport proprietors in the process of controlling the noise received by local residents. 34 Fed. Reg. 18355.

The federal courts have consistently confirmed the right of airport proprietors to regulate noise. "[I]f any coherent Federal policy can be discerned, it is that aircraft noise abatement with respect to particular airports is primarily up to the local proprietor, not the FAA." *DiPerri v. Federal Aviation Administration*, 671 F.2d 54, 57 (1st Cir. 1982). An apt summary of the law is contained in *Santa Monica Airport Ass'n*, 659 F.2d at 104-05:

> "The legislative history shows that Congress intended that municipal proprietors enact reasonable regulations to establish acceptable noise levels for airfields and their environs. *See, e.g., British Airways Bd. v. Port Authority of New York*, 558 F.2d 75, 84-85 (2d Cir. 1977) (and authorities cited therein) .... Congress intended to allow a municipality flexibility

in fashioning its noise regulations. *See Hayward, supra,* 418 F.Supp. at 425, n.13."

See also Global International Airways Corp. v. Port Authority of New York and New Jersey, 727 F.2d 246, 251-52 (2d Cir. 1984), and *Air Transport Association v. Crotti,* 389 F.Supp. 58 (N.D.Cal. 1975).

The courts have also confirmed the inappropriateness of federal intervention in the discretionary decisions made by a municipal proprietor, noting that the principles of comity and federalism "militate against our invalidating a state or local regulation unless it is written in unlawful terms, or because, on its face, it is preempted." *Santa Monica Airport Ass'n,* 659 F.2d at 104-05.[10] *Accord: Western International Hotels v. Tahoe Regional Planning Agency,* 387 F.Supp. 429, 437-38 (D.Nev. 1975), *aff'd in part, rev'd in part, and vacated in part,* 566 F.2d 1353 (9th Cir. 1977) *aff'd in part, rev'd in part, and vacated in part,* 440 U.S. 391, 99 S.Ct. 1171, 59 L.Ed.2d 401 (1979) (proposition cited not affected); *Aircraft Owners and Pilots' Ass'n v. Port Authority of New York,* 305 F.Supp. 93, 103 (E.D.N.Y. 1969).

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[10]See *British Airways Board v. Port Authority of New York and New Jersey,* 558 F.2d 75, 83 (2d Cir. 1977); *Brotherhood of Locomotive Firemen & Engineermen v. Chicago, Rock Island & Pacific Railroad Co.,* 393 U.S. 129, 138-39, 89 S.Ct. 323, 21 L.Ed.2d 289 (1968). It has also been said that a party challenging the constitutionality of a local ordinance "must negative every conceivable basis which might support it." *Lehnhausen v. Lake Shore Auto Parts Co.,* 410 U.S. 356, 365, 93 S.Ct. 1001, 35 L.Ed. 200 (1973), citing *Madden v. Kentucky,* 309 U.S. 83, 88, 60 S.Ct. 406, 408, 84 L.Ed. 590 (1940). *See also Flemming v. Nestor,* 363 U.S. 603, 617, 80 S.Ct. 1367, 4 L.Ed.2d 1435 (1960); *Goldblatt v. Hempstead,* 369 U.S. 590, 596, 82 S.Ct. 987, 8 L.Ed.2d 130 (1962); *Minnesota v. Clover Leaf Creamery Co.,* 449 U.S. 456, 469, 101 S.Ct. 715, 726, 66 L.Ed.2d 659 (1981); *Kassel v. Consolidated Freightways Corp.,* 450 U.S. 662, 680-81, 101 S.Ct. 1309, 1321, 67 L.Ed.2d 580 (1981) (Brennan, J., concurring).

B. The Federal Interest In Interstate Commerce Does Not Compel Airports or Their Neighbors to Accept Environmental Burdens Fairly Determined To Be Excessive.

The carriers also argued in the District Court that the general federal interest in aviation competition may compel the City to accept increases in flights. They relied on a collection of cases (discussed immediately below) concerned only with discrimination in the allocation of existing capacity or with attacks on patently irrational restrictions. The expansion of these cases into the unprecedented mandatory injunction in issue was the District Court's most manifest error.

In the first instance, the cases relied upon by the carriers pertain solely to restrictions that have been shown either to have no rational basis or to have an impermissible discriminatory effect. In the *Concorde* cases,[11] the courts concluded that while New York could set a limit on the maximum noise levels of individual flights, it could not exclude the supersonic transport without evidence that the plane could not meet the limits. The courts in the *Santa Monica* cases,[12] which upheld a collection of proprietor regulations, struck down a blanket exclusion of jets only after the plaintiffs presented substantial evidence that some of the excluded jets were quieter than some of the piston planes which were permitted to operate at the airport.

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[11] *British Airways Board v. Port Authority of New York*, 558 F.2d 75 (2d Cir. 1977); *British Airways Board v. Port Authority of New York and New Jersey*, 437 F.Supp. 804 (S.D.N.Y. 1977); *British Airways Board v. Port Authority of New York and New Jersey*, 564 F.2d 1002 (2d Cir. 1977).

[12] *Santa Monica Airport Ass'n v. City of Santa Monica*, 481 F.Supp. 927 (C.D.Cal. 1979) *aff'd* 659 F.2d 100 (9th Cir. 1981).

The curfew cases relied upon by the air carriers[13] are no more apposite. These cases uphold curfews where they are shown to have a rational basis and strike them down where they do not. *United States v. County of Westchester,* 571 F.Supp. 786 (S.D.N.Y. 1983), is illustrative. In *Westchester,* the County decided, without any evidence that the few existing night flights constituted a noise problem, to close the airport at night. The ordinance was, of course, overturned.

Here, the City has not decided to eliminate any flights, let alone decided to close the Airport (at night or otherwise). It has decided to allow more flights (which will bring increases in the number and duration of intrusive noise events), but not until its cumulative noise goal has been achieved.[14] Accordingly, the City Council's decision as to the acceptable level of noise in the community was within its discretion. *See also City of San Antonio v. CAB,* 374 F.2d 326, 329 (D.C. Cir. 1967); *City of Houston v. FAA,* 679 F.2d 1184, 1193 (5th Cir. 1982); *Village of Belle*

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[13]*National Aviation v. City of Hayward,* 418 F.Supp. 417 (N.D.Cal. 1976); *United States v. County of Westchester,* 571 F.Supp. 786 (S.D.N.Y. 1983); *United States v. The State of New York,* 552 F.Supp. 255 (N.D.N.Y. 1982), 708 F.2d 92 (2d Cir. 1983), *cert. denied,* 466 U.S. 936, 104 S.Ct. 1907, 80 L.Ed.2d 456 (1984).

[14]Not only have the carriers failed to point out a single case which supports their claim that federal law can compel an *increase* in noise, they have ignored the admissions of the FAA that no such authority exists. The FAA has recently published for consideration by the aviation community a proposed policy which would give the FAA discretion to include, as an additional condition in grant agreements with airports, an undertaking by the airport to construct such facilities as are necessary to allow the runways to be used to their maximum capacity. Surely if the FAA or the courts had the power to accomplish this under existing law, the FAA would need no change of policy in order to justify obtaining such undertakings by contract. (E.R. 144.)

Terre v. Boraas, 416 U.S. 1, 9, 94 S.Ct 1536, 39 L.Ed.2d 797 (1974); *Brown v. ITT Rayonier Inc.,* 497 F.2d 234, 236 (5th Cir. 1974). The District Court's apparent conclusion that the national interest outweighed the legitimate environmental concerns of the City was an unprecedented effort to alter the balance of liability created by this Court in *Griggs v. Allegheny County,* 369 U.S. 84, 82 S.Ct. 531, 7 L.Ed. 585 (1982) and its progeny. It was manifestly erroneous.

C. The City's Refusal To Permit Additional Flights Until Cumulative Noise Has Been Reduced To Acceptable Levels Was Supported by Substantial Evidence.

Since the power of the City to enact regulations "to establish acceptable noise levels for airfields and their environs" is clear (*Santa Monica Airport Ass'n.,* 659 F.2d at 104), the carriers could properly obtain an injunction overriding such regulations only upon clear proof that the City's determination to achieve its noise reduction goal *before* allowing increases in flights was irrational, unduly discriminatory, or contrary to some specific federal statute. *Id.* The airlines failed to make such a showing.

Preliminarily, they made no effort to show that the City's adoption of 65 CNEL as the reasonable noise reduction goal was irrational. For good reason — both the State of California and the federal government have recognized that this is a reasonable standard. (E.R. 330, Paragraph 7.) Nor did the carriers dispute the testimony that noise in residential communities surrounding the Airport *presently* exceeds 65 dB on the Community Noise Equivalent Level Scale. (E.R. 368, Paragraph 11.)

Given their inability to challenge either the reasonableness of the City's noise reduction goal or the fact that the goal is presently being exceeded, the carriers argued

(1) that the City unreasonably refused to permit flight increases *before* achievement of the City's noise goal, (2) that the City's noise goal *can*, notwithstanding eight more takeoffs and eight more landings, be achieved if the City will only take action purportedly within its power to shift business jet flights from one runway to another, (3) that the City is obliged to allocate more of the Airport's noise capacity to the air carriers, or (4) that the new flights would pose such a minimal increase in the burdens of jet noise as to be justified in light of the federal interest in interstate commerce.[15] None of these professed bases for compelling an increase in flights withstands scrutiny.

1. It Was Clearly Reasonable To Delay Flight Increases Until Achievement Of The City's Noise Goals.

The only basis upon which the air carriers challenge the City's patently logical decision to achieve its noise reduction goal before allowing increases in flights was the inaccurate (and, in any event, irrelevant) contention that the City's Part 150 Task Force reached a different conclusion. The Task Force proposal for increases in air carrier flights was premised upon accomplishment of the overriding objective of complying with the 65 CNEL limitation. (E.R. 305, 306).

But even if the Task Force had concluded that immediate increases in flights would produce acceptable in-

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[15]The carriers also sought to convince the District Court that the City's motivations were illegitimate. The City's motivations, however, are irrelevant. *California v. LaRue*, 409 U.S. 109, 126 n.3, 93 S.Ct. 390, 34 L.Ed.2d 342 (1972) (Marshall, J. dissenting); *United States v. O'Brien*, 391 U.S. 367, 384, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968).

creases in noise levels, that would not render the City Council's determination irrational. The City's power extends beyond merely avoiding the intolerable. It may also avoid the merely burdensome. While it is obviously empowered to assure that neighborhoods are merely livable, its discretion is also broad enough "to lay out zones where . . . the blessings of quiet seclusion and clean air make the area a sanctuary for people." *Village of Belle Terre v. Boraas*, 416 U.S. at 1, 9. *Accord, Berman v. Parker*, 348 U.S. 26, 32-33, 75 S.Ct. 98, 102, 99 L.Ed. 27 (1954) ("The concept of the public welfare is broad and inclusive . . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary").

Congress has expressly refused to preempt these traditional powers of municipal proprietors. Sen.Rep.No. 1353, 90th Cong. 2d Sess. (1968) (reprinted in (1968) *U.S. Code Cong. & Ad. News* 2963); *Santa Monica Airport Ass'n*, 659 F.2d at 103 fn. 5, 104-05, *National Aviation v. City of Hayward*, 418 F.Supp. 417, 424-25 (N.D. Cal. 1976); *Aircraft Owners and Pilots' Ass'n v. Port Authority of New York*, 305 F.Supp. at 106. It follows that the District Court could not appropriately substitute its judgment as to the public good for that of the elected City Council. *See also Meachum v. Fano*, 427 U.S. 215, 229, 96 S.Ct. 2532, 49 L.Ed.2d 451 (1976) (district courts are not empowered to "sit to supervise" important state institutions); *Jett v. Castaneda*, 578 F.2d 842, 845 (9th Cir. 1978) (the court is not given the "general assignment to go about doing good.").

2. The City's Refusal To Shift Noise From One Part Of The Community To Another In Order To Achieve One Noise Goal At The Expense Of Another Was Clearly Sensible.

The carriers also claimed in the lower court that the City *could*, consistent with its noise goals, permit increases in air carrier flights merely by calling for a shift in business jet flights from the runway used by the air carriers to a runway now used almost exclusively by general aviation propeller aircraft. Their effort to challenge what is a patently reasonable decision to avoid jet flights over a portion of the community which has thus far escaped that burden relies almost exclusively upon the fact that the Task Force recommended the idea. Evidence that an appointed study group supported this proposal, however, does not support the claim that the City was irrational in rejecting it on environmental and liability grounds.

The part of the Long Beach community located under flights taking off from Runway 30 (the runway now used by both air carrier and business jets) is the most adversely impacted part of the City.[16] (E.R. 340-42, Paragraphs 23-25; 277, Paragraph 9.) The part of the community located under the takeoff path of flights from Runway 25L is not presently affected by significant noise from jet flights, although it receives abundant noise from piston aircraft. Indeed, Runway 25L is the most utilized runway at the Airport, receiving about 41 percent of the 400,000 annual takeoffs and landings. (E.R. 93.) Unlike the area to the north-west of the Airport (under the flight path of Runway 30), the community located adjacent to

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[16]Runway 30 is the runway with a compass heading of approximately 300 degrees (south-east to north-west). Runway 25L is one of two runways with a compass heading of approximately 250 degrees (east to west).

Runway 25L is not subject to cumulative noise in excess of 65 CNEL. (E.R. 277, Paragraph 9; 556.)

Thus, if business jets were diverted to Runway 25L, the number of air carrier flights on Runway 30 could be increased without an increase in cumulative noise to the north-west. (E.R. 340-42, Paragraphs 23-25.) Further, while the shifting of business jets to Runway 25L would increase the number of noise intrusions and the amount of time during which noise interferes with community activity to the west of the Airport, cumulative noise would not reach 65 CNEL. (*Id.*)

Possessed of this information, the Task Force and the City Council came to different conclusions on whether to degrade the quality of the environment to the west of the Airport in order to permit an increase in air carrier flights over the community to the north-west. In the District Court, the carriers claimed that the City simply "ignored" the Task Force proposal. To the contrary, the City considered the alternatives, both of which are reasonable, and decided to maintain the quality of the environment to the west and, at the same time, avoid increasing the City's exposure to inverse condemnation and nuisance suits from residents affected by takeoffs on Runway 25L. (E.R. 286; 273.)

The evidence in the record is more than adequate to support the City's decision. Initially, an examination of the pattern and location of noise damage suits (E.R. 391) leads to several pertinent conclusions:

First, noise suits are filed, almost exclusively, by the residents who are exposed to the noise of jets taking off and landing. Second, these residents are sufficiently disturbed by the noise that they have initiated suit even though they are subjected to a comparatively small per-

centage of the total operations at the Airport. Third, the majority of the suits (whether precipitated by takeoff or landing noise) are filed by people who receive *less* — in a great many cases, significantly less — than 65 dB CNEL. Fourth, in areas of the community exposed to many times the number of flights — but flights by propeller aircraft used by general aviation — there are very few suits. (*Id.*)

In addition to the conclusions drawn from a general examination of the pattern of noise suits, acoustic analysis showed that the proposal to shift business jets to Runway 25L would have increased cumulative noise significantly in residential areas located to the west of the Airport: CNEL values in that community would have been increased by 2 to 3 dB (*a three decibel increase representing a 100 percent increase in noise*). (E.R. 340-42, Paragraphs 23-25.) At the school nearest the west end of Runway 25L, there would have been a significant increase in the time during which aircraft noise interferes with teaching. (E.R. 367-68, Paragraph 10.) For the rest of the community, noise from aircraft operations would have intruded above ambient levels on a more substantial basis and for longer periods of time. (E.R. 848-49.)[17]

Notwithstanding the foregoing, the carriers protested to Judge Waters that the shift of business jets *must* be undertaken because no new area would be subject to noise above the 65 CNEL cumulative noise goal. In taking this position, the carriers ignored the fact that 65 CNEL is not a *minimum* which should be attained in all areas, but

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[17]The fact that cumulative noise would not exceed 65 CNEL is a false issue. At that level, there remains a significant percentage of the community which is highly annoyed by noise. The California Noise Standards thus explicitly recognize that airports may properly regulate noise below 65 CNEL. 21 *Cal. Admin. Code* Section 5003.

a *maximum* to which excessive noise must be reduced. (E.R. 329-30, Paragraph 6.)[18]

In light of these considerations, the City decided not to compromise its noise goals and open itself to new vistas of potential liability by exposing a portion of the community which has not previously been burdened by jet flights to the equivalent of about half the current air carrier jet departures. It also properly elected to preserve the quality of life in those communities.

3. The City's Refusal to Discriminate Against Other Users of the Airport In Order to Allocate Additional Flights To the Air Carriers Had Substantial Justification.

The carriers contended below that the City could have achieved its noise goals without denying new air carrier flights by imposing greater restrictions on users of the Airport other than air carriers. They claimed that the City's refusal to do so was irrational, arbitrary, or invidiously discriminatory. This contention reflects a fundamental misconception of the impacts of air carrier jet flights on noise levels and noise suits and ignores the fact that the majority of the noise capacity of the airport has already been allocated to the air carriers. The following points merit special note:

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[18]The contention that new air carrier flights can be allowed because the City can dictate which runway the business jets shall use is also based upon a false assumption that the City has control of runway utilization. To the contrary, "preferential runway use programs" are subject to the FAA's responsibility for safety. They cannot be implemented unilaterally. (E.R. 844.) Operating procedures are also subject to rigorous FAA review. 49 U.S.C. Section 1348(c); FAA Advisory Circular 91-53 (E.R. 628-34); 14 C.F.R. Parts 91.3(a), 91.87(f)(1), 91.89(h).

a. Per occurrence, the air carriers' flights are the noisiest operations. Their three percent of total operations cause 60 percent of cumulative noise in the part of the community most exposed. (E.R. 335, Paragraph 13.)

b. The lawsuits filed against the Airport are almost exclusively the result of jet noise. (E.R. 193; 387-91.)

c. General aviation flights, which have never been a controlling factor in the noise received in the most highly affected areas (E.R. 335, Paragraph 13), have reduced from 633,000 in 1980 to about 400,000 in 1985. (E.R. 513.) Thus, *substantial reductions in* non-*air carrier flights have already been accomplished.* General aviation is also a significant economic contributor to the City.[19]

d. Flights by charter and industrial operators are already minimal: in the first quarter of 1986, for example, there were 5 charter flights in total (.06 per day) and an average of less than 2 industrial flights per day. (E.R. 950-51.) The economic benefits of allowing a continuation of this modest number of flights dwarfs the entire economic impact of all air carrier flights.[20]

In short, the City has not unreasonably restricted air carriers for the benefit of other users — it has signifi-

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[19]General aviation businesses at the Airport have a $63 million impact on the local economy not counting taxes, business purchasing, or indirect employment. (E.R. 124, Paragraph 4.)

[20]The flights are operated by McDonald-Douglas Corporation ("Douglas"), which manufactures aircraft at facilities adjacent to the Airport. Douglas has grown to become the largest employer in the City, providing over 16,800 jobs; it contributes nearly $400 million directly to the Long Beach economy and contributes over $1.8 billion to the regional economy just from its payroll. (E.R. 124-5, Paragraph 15.) During 1985, Douglas had total sales of commercial aircraft from its Long Beach facility of $2.8 billion (it delivered 71 aircraft). (*Id.*)

cantly discriminated in favor of commercial aviation over other aviation interests.[21]

D. Even If Some Relief Were Appropriate, The District Court's Order Was Overbroad.

Under the standards applicable to injunctive relief, the District Court was obliged, even if it properly concluded that some relief was appropriate, to enter the narrowest effective order. *Jett v. Castaneda,* 578 F.2d at 845 (9th Cir. 1978); *Lopez v. Heckler*, 725 F.2d 1489, 1509 (9th Cir. 1984); *Toussaint v. McCarthy*, 801 F.2d 1080, 1087 (9th Cir. 1986) (injunctive relief "must be narrowly tailored . . . and must not intrude unnecessarily on state functions"); *Tanner Motor Livery, Ltd. v. Avis, Inc.*, 316 F.2d 804 (9th Cir.), *cert. denied*, 375 U.S. 821, 84 S.Ct. 59, 11 L.Ed.2d 55 (1963); *Warner Brothers Pictures v. Gittone*, 110 F.2d 292 (3d Cir. 1940) (where it was concluded that a preliminary injunction which changed the *status quo* should not be granted, *even if irreparable loss would result without the injunction*). *See also Washington Capitols Basketball Club, Inc. v. Barry*, 419 F.2d 472 (9th Cir. 1969) and *Capobianco v. First National Bank of Pelmerton*, 372 F.Supp. 416, 421 (M.D.Pa. 1974).

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[21]The carriers also argued in the District Court that delay in accommodating new entry required the City to permit new flights immediately (irrespective of the noise consequences). Delay alone, however, could not support the Order in issue because the delay in allowing new flights was occasioned by the fact that noise has remained excessive. This case is thus entirely different from *British Airways Board v. Port Authority of New York,* 558 F.2d 75 (2d Cir. 1977), *on remand*, 437 F.Supp. 804, *aff'd as modified*, 564 F.2d 1002 (2d Cir. 1977), in which the District Court expressly found that the Port Authority had "no intention" of adopting a reasonable rule to take the place of a flat exclusion of the Concorde. 437 F.Supp. at 818. Here, the City has already adopted rules to accommodate new entry.

Thus, even if the carriers made a colorable showing in favor of some relief, the District Court was obliged to fashion the narrowest reasonable remedy. If it was the barrier to additional competition among air carriers which Judge Waters found wrongful, the Court could have asked the City to develop a solution or, at most, could have ordered the City to allocate the existing 18 flights among all of the air carriers wishing to serve the Airport. The order increasing flights in the face of presently excessive noise levels went far beyond the reasonable sweep of the court's discretion to fashion an appropriate remedy.

CONCLUSION

For the foregoing reasons the City's Petition for Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Opinion of Ninth Circuit Court of Appeals Below.

United States Court of Appeals for the Ninth Circuit.

Alaska Airlines, Inc., Plaintiff-Appellee v. City of Long Beach, Defendant-Appellant; Long Beach Unified School District, Defendant-Intervenor, v. Pacific Southwest Airlines, Inc., et al., Plaintiff-Intervenor-Appellee; Alaska Airlines, Inc., Plaintiff-Appellee and Pacific Southwest Airlines, et al., Plaintiffs-Intervenors-Appellees v. City of Long Beach, et al., Defendants-Appellants.

Filed: April 14, 1987.

Appeal from: United States District Court, Central District of California, (DC No. CV 83-4065 LEW(Bx)).

MEMORANDUM*

BEFORE: WRIGHT and REINHARDT, Circuit Judges, and MUECKE**, District Judge.

In 1983 the district court issued a preliminary injunction requiring the City of Long Beach, operator of the Long Beach airport, to permit a minimum of eighteen commercial flights per day in and out of the airport. Long Beach appealed from that order. At Long Beach's request, the appeal was recently dismissed, without prejudice, subject to reinstatement by this panel. in 1986, relying on a newly enacted noise abatement ordinance, Long Beach asked the district court to vacate the preliminary injunction. Plaintiffs include both air carriers who

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*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 21.

**Honorable C. A. Muecke, United States District Judge for the District of Arizona, sitting by designation.

have historically used the Long Beach airport and "new entrant" carriers who have sought for some time to use the airport for commercial flights. At the same time the City of Long Beach moved to vacate the 1983 preliminary injunction, the "new entrant" carriers asked the court to amend the injunction by increasing the minimum number of permitted flights. The district court refused Long Beach's request to vacate the preliminary injunction and amended that order by increasing the number of permitted flights from eighteen to twenty-six per day. The additional flights were subsequently awarded to the "new entrant" carriers. Long Beach now appeals the 1986 actions of the district court.

We review the district court's actions under an abuse of discretion standard. *Sports Form Inc. v. United Press International,* 686 F.2d 750, 753 (9th Cir. 1982). *See also Los Angeles Memorial Coliseum Com'n v. National Football League,* 634 F.2d 1197, 1200 (9th Cir. 1980). We affirm.

In refusing to vacate the preliminary injunction, the district court concluded that serious questions were raised regarding the legality of the newly enacted noise ordinance which contained a nonseverability clause. The district court also concluded that the City had failed to formulate any plans for improvement of the airport facilities. The district court took careful note of the various interests of all parties involved, including the residents of the City of Long Beach. It also recognized the authority of city airport proprietors "to enact reasonable nonarbitrary and nondiscriminatory airport access ordinances." With respect to the request to increase the minimum number of permitted flights, the district court found that "[a]ny further delay in this matter [would be] unreasonable".

We note, preliminarily, that in issuing the 1983 preliminary injunction the district court did not abuse its discre-

tion and applied the proper legal standards. With respect to its refusal to vacate the 1983 injunction, we conclude that the district court's action was well within its discretion. We cannot say that the district court committed a clear error of judgment nor do we have a firm conviction that a mistake has been committed with respect to any factual matters. A decision as to the validity of the newly enacted noise ordinance must await a trial on the merits. At that time the court can carefully examine the ordinance and its effects, as well as the available alternatives, in light of *Santa Monica Airport Ass'n v. City of Santa Monica*, 659 F.2d 100 (9th Cir. 1981), and *British Airways Board v. Port Authority of New York and New Jersey*, 564 F.2d 1002 (2d Cir. 1977). Similarly, with respect to increasing the number of permitted flights, we conclude that the district court committed no legal error and acted within its discretion. The appropriate minimum number of flights to be permitted in 1987, as opposed to 1982, is a matter which we would hesitate to substitute our judgment for that of a district court. In reaching this conclusion we read the 1986 order in light of the findings and conclusions issued in support of the 1983 injunction.

There are two additional points we wish to note. First, our decision indicates no view as to the ultimate answer to any questions involved in this case. Our standard of review for preliminary injunctions is different from that applicable to permanent injunctions. Second, the preliminary injunction that was recently amended was issued a number of years ago. The purpose of preliminary injunctions is to ensure that the parties comply with appropriate conditions pending resolution of the case on the merits.

Preliminary injunctions are not intended to be of indefinite duration. Within a reasonable time the parties should bring their dispute to trial on the merits or arrive at an appropriate settlement.

AFFIRMED

APPENDIX B

Order of the United States District Court for the Central District of California.

United States District Court, Central District of California.

Alaska Airlines, Inc., Plaintiff, Pacific Southwest Airlines, Jet America Airlines, Airserv, Air California, Western Airlines, America West Airlines, Inc., United Airlines, Inc., American Airlines, Inc., and Ozark Airlines, Inc., Plaintiffs In Intervention v. City of Long Beach, Long Beach City Council, Marc A. Wilder, Wallace Edgerton, Jan Hall, Thomas J. Clark, Ernie Kell, James Wilson, Eunice Sato, Edd Tuttle, and Warren Harwood, Defendants, Long Beach Unified School District, and Long Beach Hush, Inc., Defendants In Intervention.

Filed: October 17, 1986.

United States District Court, Central District of California, (No. CV 83-4065 LEW (Bx)).

Order Re: City of Long Beach's Motion to Vacate The Preliminary Injunction And The Plaintiff Airlines' Motions to Modify The Preliminary Injunction.

The City of Long Beach's motion to vacate the preliminary injunction of December 9, 1983 and the motions by AirCal, Western, America West, United, Jet America and Alaska to modify that injunction came on for hearing on September 8, 1986. After oral argument, the Court denied the City's motion and took the airlines' motions under submission. The Court has considered all of the papers submitted in connection with this matter and has considered the arguments made by counsel at the hearing. The Court hereby grants the airlines' motions to modify the preliminary injunction and orders an increase of eight (8)

daily flights at Long Beach Airport — from the current total of eighteen (18) daily flights to twenty-six (26) daily flights.

As a preliminary matter, the Court recognizes the diversity of interests involved in this case. The residents of the City of Long Beach seek to minimize the volume and number of noise intrusions by airplanes serving the airport. Those interests clash with the airlines' goal of increasing the number of flights at the airport. To complicate matters, the air carriers themselves differ as to how such additional flights should be allocated. AirCal, Western, America West and Ozark — the "new entrants" — seek to institute service at Long Beach Airport, an opportunity the City has persistently denied them during the course of this litigation. Allocating flights to the new entrants, they point out, furthers the policy stated in the Airline Deregulation Act of 1978, 48 U.S.C. 1302, of increasing competition in the airline industry. The City acknowledges the new entrants' point in the most recent noise compatibility ordinance, which provides for the preferential allocation of new flights to the new entrants.

Conversely, the airlines presently serving Long Beach Airport requests that any additional flights be granted to them. They contend that, like the new entrants, they too have patiently awaited the flight increases. Moreover, they argue that their flight allotment should be increased in return for the business risk they undertook in establishing service at the airport.

The interest of the general public must also be considered. The welfare of the Long Beach residents demands a well-planned growth policy at the airport. Such a growth policy must also account for the public's interest in a vibrant national transportation system — a linchpin of our national system of commerce.

The Long Beach City Council has the formidable job of balancing these diverse interests. As political representatives of the city and proprietors of the airport, they are answerable politically to city residents and responsible legally for lawsuits brought due to excessive noise. In addition, they must attend to the interests of the airlines, the public and the national commercial system. The courts, recognizing these responsibilities, have granted city airport proprietors the power to enact reasonable, non-arbitrary and non-discriminatory airport access ordinances. *Santa Monica Airport Ass'n. v. City of Santa Monica*, 481 F. Supp. 927 (C.D. Cal. 1979), *aff'd*, 647 F. 2d 3 (9th Cir. 1981).

Upon careful consideration, the Court finds that the record raises serious questions as to the reasonableness and fairness of the City's program to limit growth at Long Beach Airport. These questions are amplified by the City's failure to formulate a plan for improvement of airport facilities after almost two years of studying the airport access problem. Thus, the Court denies the City's motion to vacate the injunction and enact its new airport access ordinance.

The Court further orders an increase of eight (8) daily flights at the Long Beach Airport. The record clearly shows that new flight activity at the airport is justified. Even the City concedes in its new ordinance that a total of thirty-two (32) daily flights can be accommodated at the airport. Moreover, the Part 150 study task force — a City-appointed group that extensively studied the issues of noise and access — recommended that a total of forty-one (41) daily flights could be handled. While an FAA review of the task force recommendations would add another objective analysis to the voluminous data, such a study would also add *at least* another six months of delay to this protracted litigation. Any further delay in this

matter is unreasonable, defeats the public interest and contradicts the Congressional policy of a vibrant and competitive airline industry.

The City is invited to submit a proposal as to the method of allocation of these additional eight (8) daily flights. Such a proposal should address the interests aforementioned in this Order and be submitted by November 7, 1986. Upon receipt of the City's recommendations, comments will be solicited from all interested parties.

IT IS SO ORDERED.

LAUGHLIN E. WATERS
Sr. United States District Judge

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On June 10, 1987, I served the within Petition for Writ of Certiorari in re: "City of Long Beach vs. Aircal Inc., America West Airlines" in the United States Supreme Court, October Term 1986, No. 86-6661 and 86-6662;

On the Parties in said action, by placing Three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

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All Parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on June 10, 1987, at Los Angeles, California

Ce Ce Medina

CE CE MEDINA

Subscribed and Sworn to before me this 10 TH day of June, 1987.

My Commission Expires 10/27/90.

June A Mason

Notary Public

OFFICIAL SEAL
JUNE A MASON
NOTARY PUBLIC - CALIFORNIA
LOS ANGELES COUNTY
My comm. expires OCT 27, 1990